UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

VIDEO PROFESSOR, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:09-cv-01025-RPM
	)	
DEAN GRAZIOSI, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION BY JUSTIN LEONARD AND LEONARD FITNESS, INC. FOR AWARD OF ATTORNEY FEES AND COSTS

Defendants Justin Leonard and Leonard Fitness, Inc. (referenced here jointly as "Leonard," unless otherwise specified), have moved the Court to award $30,308.50 in attorney fees and costs against plaintiff Video Professor and its counsel. Leonard should never have been a defendant in this case, because web site operators like Leonard, the former operator of the infomercialscams.com web site, who simply provide a discussion forum where consumers may publish their complimentary or critical views about companies are immune from suit under a federal statute. 47 U.S.C. § 230. Plaintiff tried to plead around that immunity by charging the defendants in this case with extortionate conduct and with trademark violations, but Leonard had sold the web site in May 2008, long before the activity on which those claims were based. Even after learning that Leonard was not responsible for the wrongs about which they complained, plaintiff and its counsel not only refused to release Leonard from the action but tried to increase pressure on him by seeking a preliminary injunction against him personally to stop conduct over which Leonard no longer had any control. Moreover, the trademark claims themselves were utterly without foundation. Accordingly, plaintiff and its

counsel should be subjected to sanctions under Rule 11, in that they maintained the action even after they learned that their factual contentions about Leonard lacked evidentiary support, and under 28 U.S.C. § 1927 because they multiplied litigation.

STATEMENT OF THE CASE

A. Facts

As shown by his affidavit submitted during the course of the litigation (Docket Entry No. ("DN") 21-2), Justin Leonard, a former bodybuilding champion, created Leonard Fitness, Inc., in August 1999, while he was serving in the Air Force, and operated a web site about fitness at leonardfitness.com. In early 2002, Leonard was honorably discharged from the Air Force. Spurred by his experience with the evolution of a discussion forum on the Leonard Fitness web site where consumers raised questions about the adequacy of various fitness products that had been sold by infomercials, Leonard created several web sites that permitted members of the public to recount their experiences with products and services that are sold through television infomercials. One of these web sites was located at www.infomercialscams.com. As Leonard eventually developed it, the web site featured articles telling consumers how to assess infomercials, how to protect themselves against being defrauded, and where to get more information. Leonard also provided pages where consumers could recount either negative experiences or positive experiences with infomercial products and their purveyors. From time to time, infomercial purveyors used the forums about their respective products to reply to their critics. There was never any charge for posting such information; like many Internet web sites, infomercialscams.com was supported by advertising. Because the site was discussed favorably elsewhere on the Internet and was linked from web sites with good reputations, and

because Internet users frequently chose to visit Leonard's web site when using the names of various infomercial products as search terms on Google, his site typically ranked fairly high in search results when Internet users entered the terms of infomercial products into search engines. The message board pages of infomercialscams.com typically used the same set of description and keyword meta tags that were generic to the entire web site; the names of the specific products being discussed on the pages did not appear in the meta tags.

One of the hundreds of infomercial purveyors whose products and operations were discussed on infomercialscams.com was plaintiff Video Professor, a Denver-based company that sells simplified lessons about how to use various kinds of software (such as word processors or spreadsheets) and how to make money online (such as by selling goods on eBay). Although the infomercials tout the availability of "free" lessons, those who call to take advantage of plaintiff's offer may find themselves saddled with significant monthly credit-card charges for additional lessons, often for lessons in which they have no interest, based on plaintiff's claim that they agreed to take additional lessons on approval. These sales practices have been criticized in several quarters, including postings on infomercialscams.com from consumers describing their experiences with plaintiff and their unsuccessful efforts to cancel the charges.

In August 2007, Video Professor filed suit against numerous Doe defendants, claiming that they had used "various Internet bulletin boards" to defame it. *Video Professor v. Doe*, No. 07-cv-01726-WYD-CBS, attached to the First Levy Affidavit (filed in support of Leonard's motion for summary judgment) as Exhibit B, ¶ 15. (DN 21-5). Video Professor frankly acknowledged in its complaint in that action that it would much rather obtain relief directly against the message board

hosts, but that federal law — specifically, section 230 of the Communications Decency Act, 47 U.S.C. § 230 — immunized the hosts for the messages over which it was suing against any such suit. 2007 Complaint (DN 21-5) at 1-2.

Video Professor issued subpoenas to the forums where the criticisms had been posted, seeking information that could be used to identify its anonymous critics. When Leonard was subpoenaed, he served objections under Rule 45, pointing out that courts refuse to enforce such subpoenas unless the plaintiff can present evidence showing that the statements about it both are false and have caused some discernible damage. DN 21-6. Video Professor responded by sending Leonard a very general and conclusory affidavit that did not squarely meet the criticisms of the consumers whose accusations Video Professor claimed were defamatory. Leonard explained why he found it unpersuasive and declined to provide the requested identifying information unless better evidence was provided. DN 21-7, 21-8. At the same time, Leonard went public with the dispute, and Video Professor faced a firestorm of publicity for having sued its customers and for its abusive sales practices. Examples of this criticism were attached to the First Levy Affidavit as Exhibit F (DN 21-9).[1]

Rather than provide the requested proof, Video Professor withdrew its subpoena to Leonard, DN 21-10, but nevertheless asked the Court for an extension of time to serve Doe defendants who had posted allegedly false statements on Wikipedia. *Id.* Leonard filed an opposition to this

[1]In this brief, "Levy Affidavit" refers to the Affidavit submitted in support of Leonard's motion for summary judgment. DN 21-4. "Second Levy Affidavit" refers to the Affidavit submitted with this memorandum in support of the motion for award of attorney fees.

requested extension, arguing that the complaint did not show a proper basis for subject matter jurisdiction and was in any event insufficient to state a cause of action against any of the Does. Leonard argued, based on several specific instances, that Video Professor was abusing the subpoena power made available by the pendency of the action to harass its online critics and the forums where their criticisms had been posted. DN 21-11. Without responding to these arguments, Video Professor dismissed its action altogether. (DN 21-12.

A few months after that litigation ended, Leonard sold his infomercial review web sites to a company called Infomercial Consumer Awareness, Inc. Leonard Affidavit ¶ 16, DN 21-3. As revealed by the sales agreement (which was provided to plaintiff after it filed the complaint in this case), the sale was complete on May 1, 2008. Exhibit A (DN 21-4). Leonard was paid in a single lump sum by a cashier's check on May 12, 2008. Leonard Affidavit ¶ 16; DN 21-13. The terms of the sale divested Leonard of all rights and interests in the sites, including infomercialscams.com, and specifically forbade Leonard from engaging in any business similar to the business that he had just sold. After that sale, Leonard scrupulously observed the agreement and played no role in any infomercial review web sites, including the web sites that he had just sold. Leonard Affidavit ¶ 16.[2]

The complaint, which was filed on May 1, **2009** — one year to the day after Leonard sold the site — expressly admitted (¶ 51) that the year leading up to the filing of the complaint saw some dramatic changes in the way the web site had been operated. Yet it was those changes that formed

[2]After Infomercial Consumer Awareness purchased the web site, Leonard's name was largely removed from the web site, and replaced by the name "Infomercial Consumer Awareness." Unbeknownst to Leonard, his name and the name Leonard Fitness were left on a few pages. Leonard Affidavit ¶ 21.

the basis for the complaint. The meta tags of the pages in which Video Professor was discussed were changed so that Video Professor's name appeared in both the description and the keyword meta tags. The owners of the web site developed a "Consumer Protection Program" that prominently offered companies whose products were adversely discussed on the web site "the chance to defend yourself." ¶¶ 52-53. The complaint further alleged that, after completing an online form to participate in this Program, a Video Professor representative had telephone discussions with a representative of the current operators of the web site and was told about the way in which this new program operated, including the overt promotion of a participating company, creation of a special channel for users of the web site to communicate with the company so that their concerns could be met, and suppression of criticism of the participating company. ¶¶ 55-101. The complaint alleged as well that the representative indicated that participation in the program would cost hundreds of thousands or even more than a million dollars. *Id.* Finally, the complaint alleged that, during the conversation with the site's representative, Video Professor's representative was told about a sophisticated scheme for providing complimentary ratings for Video Professor's competitors and the payment of a bounty by those competitors when users bought their products as a result of their visits to the infomercialscams.com web site. *Id.* The complaint did not contain any specific allegation tying Leonard to **any** of this alleged wrongdoing, and Leonard had no involvement in it. Leonard Affidavit ¶¶ 16, 18, 19.

B. Proceedings to Date

The complaint in this case was filed on May 1, 2009. Like the complaint filed over postings on infomercialscams.com eighteen months before, Video Professor began by acknowledging that,

as a general matter, the operator of a consumer commentary site is ordinarily immune from suit under federal law. ¶ 38. The complaint then set about alleging facts that were intended to defeat section 230 immunity. To support naming Leonard as a defendant, Video Professor falsely alleged that Leonard is currently associated with the other defendants (¶ 8), that Leonard Fitness currently has an ownership interest in infomercialscams.com (¶ 9), that Leonard "remains active and involved" in the infomercialscams web site, as well as the Consumer Protection Program (¶ 32), and that Leonard is one of several defendants who joins defendant Dean Graziosi in "'bash[ing]' his fellow Infomercial Companies and competitors, and extorts and attempts to extort money from their businesses allegedly to 'clean up' their public images, while touting the quality and results of his own improper sales scheme on the Infomercialscams website." (¶ 89). More generally, the complaint falsely lumped Leonard in among the "Defendants" who are accused of wrongdoing throughout the complaint. The complaint also attempted to plead around section 230 by alleging that the infomercialscams.com web site placed the trademarked name Video Professor in its meta tags, thus supposedly constituting "trademark infringement" under a Tenth Circuit decision cited in the complaint. *See* 47 U.S.C. § 230(e)(2) (immunity does not affect intellectual property claims).

Leonard Fitness was served on May 8, and Leonard was served on May 11. Through undersigned counsel Paul Alan Levy, Leonard obtained permission from counsel for the new owners of his old web site to disclose the sales agreement. The agreement contains a confidentiality clause barring any disclosure, and hence waiver of this clause was required. The agreement shows that

Leonard sold the web site before any of the wrongs alleged in the complaint had occurred.[3] Mr. Levy then called plaintiff's counsel, Gregory Smith, Esquire, to let him know that Leonard was no longer involved with the web site and offered the sales agreement as proof. DN 21-4, ¶ 8. On May 14, 2008, the agreement was emailed to Video Professor's counsel, DN 21-13, who then demanded to see the canceled check that was used to pay for the web sites because, he said, his client was suspicious. DN 21-14. On May 15, the canceled check was provided to Video Professor's counsel (with the payment amount redacted, along with routing information that could disclose Leonard's own banking information). DN 21-4 ¶ 9, DN 21-15. Even though Video Professor's counsel had previously agreed that provision of the canceled check would be sufficient to get Leonard released from the case, counsel then announced that he would not be dismissed from the action. DN 21-4 ¶ 9. Mr. Levy then warned that, if Leonard was not immediately dismissed from the action, he would seek Rule 11 sanctions for naming Leonard Fitness and Leonard individually as defendants even though Leonard had sold the site and had no involvement in the alleged wrongdoing. DN 21-16. However, Video Professor was obdurate, indicating that Leonard would be dismissed from the case only if he agreed to give Mr. Smith a private interview, with a court reporter present, to answer questions about the other defendants. Mr. Levy objected to holding Leonard hostage to obtain discovery to which Video Professor was not yet entitled.

---

[3] Counsel for the new owners insisted that the price be redacted from the contract and that Leonard ask Video Professor's counsel for assurance that the contract would not be disclosed publicly. Rather than risk litigation over whether he could disclose the contract without permission to exculpate himself from the accusations in the complaint, Leonard agreed to those terms. Video Professor's counsel also agreed to accept the document on those terms. Because the unredacted documents have since been disclosed, the copies attached to this motion are not under seal.

Mr. Smith also announced that Video Professor was going to seek a preliminary injunction against Leonard and seek leave to commence discovery in aid of that motion without awaiting the Rule 26(f) conference. DN 21-17. Mr. Levy urged Mr. Smith not to seek preliminary injunctive relief against Leonard inasmuch as Leonard no longer had any say in how the web site operated. Instead, he suggested that Video Professor seek a broad injunction against the other defendants, including anybody who acted in concert with the defendants. That way, he could avoid burdening Leonard with responding to his motions, while ensuring that, if Leonard were lying about no longer being involved, he could get contempt sanctions against Leonard for any violation of the injunction. DN 21-18. This plea fell on deaf ears; Video Professor moved for a preliminary injunction against Leonard along with the other defendants. DN 19, DN 20.

On May 18, Leonard served a motion for sanctions under Rule 11, thus commencing the running of the 21-day safe harbor period under Rule 11(c)(2). Second Levy Affidavit ¶ 15 and Exhibit R. Mr. Smith suggested that Leonard stop trying to explain why the suit had no merit and just negotiate his way out of the case*, id.* Exhibit S; Mr. Levy responded by reminding Mr. Smith that nearly half of the safe harbor period had passed, and again urged Video Professor's counsel Mr. Smith to drop Leonard from the case before Leonard had to prepare papers in support of a dispositive motion. *Id*, Exhibit T. Leonard prepared a motion to dismiss and, in the alternative, for summary judgment. DN 21. Meanwhile, one of the defendants negotiated for a settlement, and a draft settlement agreement was sent to Mr. Levy, whereby Leonard was to agree never to use Video Professor's name without its express permission and never to disparage Video Professor or to host any comments disparaging Video Professor on any web site. Because Leonard had done nothing

actionable, he was unwilling to enter into any such settlement. Indeed, although Leonard had in the past only hosted comments by others about Video Professor, Video Professor's two frivolous lawsuits, first against posters on his web site and then against himself personally, had confirmed Leonard's unfavorable opinion about Video Professor and he was unwilling to promise not to express his views or to make a site available for others to express their views in the future. Mr. Levy wrote directly to Mr. Smith to explain why Leonard was not going to enter any such settlement and urged him to drop Leonard from the suit. Levy Affidavit ¶¶ 15, 18, and Exhibit S.

Video Professor then effected a settlement with the remaining defendants, who took down the infomercialscams.com web site. On July 8, two days before its response to Leonard's motion to dismiss and/or for summary judgment was due, Video Professor dismissed its claims against Leonard. DN 28.

ARGUMENT

Plaintiff and Its Counsel Should Be Sanctioned for Violating Rule 11 and 28 U.S.C. § 1927 by Maintaining This Action Against Leonard, and Seeking a Preliminary Injunction Against Him, After They Learned That Leonard Had Sold the Infomercialscams Web Site to Infomercial Consumer Awareness and Was No Longer Involved With the Site.

Under Rule 11(b) of the Federal Rules of Civil Procedure, by "signing, filing, submitting or later advocating" the complaint, plaintiff Video Professor and its counsel certified that,

> to the best of [their] knowledge, information and belief, formed after an inquiry reasonable in the circumstances,
>
> (1) it is not being presented for any improper purpose . . .;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and]

> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

As amended in 1993, the Rule provides that these certifications are not limited to information in the possession of a party and its counsel at the time they submit the certified document. Instead, Rule 11 now also imposes a continuing "duty of candor by subjecting litigants to potential sanctions for insisting on a position after it is no longer tenable, . . . or . . . advocating positions contained in those pleadings . . . after learning that they cease to have any merit." Advisory Committee Note to 1993 Amendments to Rule 11; *Phonometrics, Inc. v. Economy Inns of America*, 349 F.3d 1356, 1362-1363 (Fed. Cir. 2003). Moreover, that plaintiff may have had evidence sufficient to proceed against other defendants does not excuse its proceeding against a particular defendant without evidence implicating that specific defendant in the other defendants' wrongdoing. *Laurino v. Tate*, 220 F.3d 1213, 1219 (10th Cir. 2000).

Although the allegations about Leonard's continuing involvement in the site are carefully couched as being "on information and belief,"

> Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification.
>
> Advisory Committee Note to 1993 Amendments to Rule 11.

A complaint cannot be based merely on the plaintiff's beliefs and suspicions. *Zuk v. Eastern Pennsylvania Psychiatric Inst. of the Med. Coll. of Pennsylvania,* 103 F.3d 294, 299 (3d Cir. 1996). Moreover, although the allegations that discuss Leonard specifically are made on information and

belief, throughout the complaint are allegations that "defendants" — a term that includes Leonard — have committed various acts of extortion, racketeering, and other wrongs, and those allegations are not limited to being made on information and belief.

In this case, plaintiff recognized — indeed, admitted in its complaint — that controlling law forbids suit against people like Leonard who host web sites that allow members of the public to express their views about companies like the plaintiff. The Tenth Circuit recognizes this immunity from suit, *Ben Ezra, Weinstein, & Co. v. AOL*, 206 F.3d 980, 983, 986 (10th Cir. 2000), as does every other appellate court that has reached the issue. *E.g., Universal Communication Systems v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1125 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018, 1026 *et seq.* (9th Cir. 2003). Video Professor, however, sought to plead around the immunity statute by reference to changes in the web site that occurred after May 2008.

Because plaintiff was in litigation in the fall of 2007 over statements on the Infomercialscams web site, and Leonard identified himself at that time as the operator of the web site, and opposed a subpoena seeking to compel him to identify plaintiff's online criticisms, plaintiff and its counsel knew that he was affiliated with the web site at that time. Perhaps plaintiff and its counsel will contend that they simply assumed that Leonard was still running the sites when they filed suit. But, even assuming plaintiff and its counsel can present evidence showing that they had reason to believe that Leonard remained connected to the web site as of May 1, when they filed the complaint,[4] the

[4]Even before filing the suit, plaintiff had apparently received some information indicating that Leonard was no longer involved with the web site. When undersigned counsel Mr. Levy called Mr.

reasonableness of that belief was eliminated when Mr. Levy informed Mr. Smith that the web site had been sold and sent Mr. Smith the sales agreement. Mr. Smith expressed some concern about whether the sale was genuine and asked to be provided with a copy of the canceled check showing that Leonard had been paid for the site pursuant to the agreement; that check was obtained and sent to Mr. Smith. Video Professor and its counsel may quibble about whether the agreement and check were conclusive evidence of a sale, but the key question for Rule 11 purposes is not whether Video Professor and its counsel had some excuse for questioning those documents, but **what evidence they had** of Leonard's continued involvement.

Moreover, other allegations in the complaint make clear that plaintiff recognized that the aspects of the infomercialscams.com web site about which it complained had developed in the year between Leonard's sale of the web site in May 2008 and the filing of the complaint in May 2009. For example, paragraph 51 alleged that the "Consumer Protection Program" represented a "significant change" in the website "within the last few months." Similarly, paragraph 46 alleged that plaintiff only "recently discovered" that the infomercialscams website was attaining high search rankings on Google through the use of what it called "improper metadata" on the infomercialscams.com web site. Inasmuch as the previous case filed against the Does revealed that plaintiff has been monitoring the infomercialscams web site for some time, but did not allege the improper use of metadata, the "recent discovery" at least implies that Video Professor knew that the

---

Smith to inform him that Leonard was no longer involved with the site, Mr. Smith indicated that defendant Graziosi had reportedly stated that Leonard did not know how much his web site was worth, implicitly because he did not appreciate how effectively the other defendants could use it for extortionate purposes after they acquired it from Leonard. Second Levy Affidavit ¶ 14.

metadata was not there previously. Leonard's affidavit filed in support of his motion to dismiss and/or for summary judgment establishes that he never used Video Professor's name in the meta tags for his site while he controlled it.[5] Leonard Affidavit ¶¶ 12-13, DN 21-2. There is no reason why Video Professor and its counsel should not have discovered this fact before filing its complaint against Leonard, and if they didn't remember, all they had to do was check the online Internet Archive before filing the complaint. Had they reviewed versions of the web site as contained in the Internet Archive from early 2008, when Leonard still owned the site, they would have seen that plaintiff's marks were not then used in the meta tags of the discussion pages about plaintiff's product. *See, e.g.,* http://web.archive.org/web/20080123110926/www.infomercialscams.com/scams/video_professor. Review of the Internet Archive similarly reveals that there was no reference to any "Consumer Protection Program" at that time.

Plaintiff's counsel nevertheless refused to dismiss Leonard, insisting that he be permitted to ask Leonard various questions about the new owners of the web site. Leonard, however, objected to being held hostage as a defendant to provide discovery after plaintiff knew that he had sold all interest in the web site. Indeed, because a plaintiff is always entitled to take discovery from a third party by serving a Rule 45 subpoena, plaintiff's insistence on keeping Leonard as a defendant may

---

[5]The keyword meta tags from the Video Professor discussion pages while Leonard was running the site were: "infomercial scams, infomercial reviews, infomercial ratings, justin leonard, commercials, rip offs, scams, business, fraud, ripoffs, consumer protections, consumer complaints, bad business practice, infomercial resources, make money, money making schemes, legal action, how to take legal action, report a crime, crime victims, products." The description meta tag was: "Uncensored infomercial complaints!" The same meta tags appeared in **all** of the product discussion pages concerning all of the products discussed on the web site. Leonard Affidavit ¶ 13.

imply a motive of harassment. Moreover, the course of proceedings during the litigation of *Video Professor v. Doe* a year earlier shows a pattern of the misuse of litigation to suppress dissent as well as to obtain improper discovery for purposes of harassment. For example, Video Professor sued a hundred anonymous critics for allegedly making defamatory statements on web sites maintained by Leonard and others, but revoked its subpoenas and dropped the suit as soon as it became clear that the subpoena recipients were not simply going to roll over but were demanding evidence that the statements were false. And during that litigation Video Professor apparently misused discovery by issuing a subpoena to intimidate an anonymous speaker who could not have been one of the Does sued in the complaint (because his criticism was made after the complaint was filed), but for the apparent purpose of suppressing inconvenient evidence. Second Levy Affidavit ¶ 17. Consequently, Leonard's counsel advised that, unless plaintiff dismissed Leonard from the case immediately, he would serve a motion for sanctions and thus begin the running of the safe harbor period of Rule 11(c)(2). *See Roth v. Green*, 466 F.3d 1179, 1191-1193 (10th Cir. 2006). Such a motion was served on May 18, 2009.

Moreover, apart from the fact that Video Professor's invocation of trademark allegations to try to plead around section 230 immunity were baseless as to Leonard because they rested on uses of meta tags that commenced after Leonard sold his web site, the trademark claims were also groundless as a matter of law, for several reasons. First, the complaint was facially insufficient to state a trademark claim because there was no allegation that consumers were likely to experience confusion about whether Video Professor is the sponsor or is otherwise affiliated with the infomercialscams.com web site.

> [T]he central inquiry in a trademark infringement case is the likelihood of consumer confusion. *Team Tires Plus, Ltd. v. Tires Plus*, *Inc.*, 394 F.3d 831, 832 (10th Cir.2005); *see also Australian Gold, Inc. v. Hatfield*, 436 F.3d at 1238 ("The party alleging infringement has the burden of proving likelihood of confusion.").
>
> *Beltronics USA v. Midwest Inventory Distrib.*, 562 F.3d 1067, 1071 (10th Cir. 2009).

The mere allegation that a defendant used meta tags did not make an allegation of likelihood of confusion unnecessary, because, contrary to the citation in the Complaint, the Tenth Circuit's decision in *Australian Gold* did not hold that use of meta tags by someone other than the trademark holder constitutes per se infringement. In *Australian Gold*, the use of meta tags for a web site that sold plaintiff's product at one time as well as the products of its competitors, but later sold **only** products of the plaintiff's competitors, was one of several grounds supporting a jury verdict of infringement.

Moreover, the Ninth Circuit's *Brookfield Communications* decision, on which *Australian Gold* relied for its analysis of meta tags, expressly noted that the use of a trademark on a page offering a comparative discussion of the trademark owner's product — even on a web page sponsored by a competitor — would be protected fair use. *Brookfield Communications v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1065-1066 (9th Cir. 1999). *Brookfield* cited approvingly a district court decision (later affirmed by the Ninth Circuit) upholding as fair use the use of meta tags on a web site to designate, truthfully, the content of the web site. *Id.* at 1066. And several district courts have squarely upheld the use of a trademark in the meta tags for a web page critical of the trademark holder. *E.g.*, *Gregerson v. Vilana Financial*, 2006 WL 3227762 (D. Minn., Nov. 7, 2006); *J.K. Harris & Co. v. Kassel*, 253 F. Supp. 2d 1120 (N.D. Cal. 2003); *Bihari v. Gross*, 119

F. Supp. 2d 309 (S.D.N.Y. 2000); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 (C.D. Cal. 1998).

Australian Gold was a case in which the plaintiff **carried the burden** of proving likelihood of confusion in a number of respects. Here, by contrast, not only did Video Professor not allege likelihood of confusion, its complaint demonstrated how unlikely it was that a consumer examining a Google search would have experienced any confusion, even "initial" confusion, about whether clicking on the search result for infomercialscams would lead to a web site sponsored by Video Professor. In paragraph 44 of its complaint, Video Professor objected to the fact that the first page of a Google search will display the following search result:

> INFOMERCIAL SCAMS.COM - VIDEO PROFESSOR COMPLAINTS
> Read real consumer complaints, reviews & ratings for Video Professor. Before you buy Video Professor , read what other buyers have to say.
> www.infomercialscams.com/scams/video_professor -

But no consumer would have viewed this search result and imagine that clicking on the link would take them to a web site sponsored by Video Professor. The trademark claim in this case was utterly without foundation and hence is a proper basis for Rule 11 sanctions even if Leonard had continued to own the web site while Video Professor's name was placed in the meta tags.

Not only did plaintiff not dismiss Leonard from the action, it threatened to seek a preliminary injunction against him despite the absence of any reasonable basis for believing that Leonard remained involved with the site. In filing its motion for a preliminary injunction, however, plaintiff did not attach any evidence showing that Leonard was personally involved in the wrongdoing of which it complained, which supports the inference that it **had** no evidence. Yet Leonard was

compelled to retain counsel to oppose the preliminary injunction and to file a motion for summary judgment. Leonard complied with the procedural prerequisites for a Rule 11 motion, Rule 11 was violated, and Leonard should be compensated through an award of attorney fees.

Moreover, by filing the motion for a preliminary injunction against Leonard, Video Professor needlessly multiplied the litigation in a vexatious and oppressive manner, thus warranting at least an award of fees under 28 U.S.C. § 1927 for time spent on the case after that motion was threatened. Even if Video Professor thought that Leonard still had some connection to the new owners of the web site — despite the absence of any evidence for the proposition that it genuinely entertained that belief — Video Professor still had no need to bring its motion for a preliminary injunction against Leonard except for the purpose of pressuring him into entering a settlement agreement giving up his right to criticize Video Professor in the future as well as his right to seek sanctions and sue for malicious prosecution.

Furthermore, as Mr. Levy pointed out to Mr. Smith, even assuming that Video Professor genuinely believed that Leonard remained involved with or responsible somehow for the other defendants' allegedly tortious conduct, it could achieve the objective of obtaining an order enforceable against Leonard without putting him to the expense of opposing preliminary relief by the simpl expedient of presenting a proposed order that explicitly reached other persons acting in concert with the defendants overtly identified in the injunction. If Leonard were lying about his non-involvement in the web site, such an injunction would have been a sufficient basis for seeking contempt sanctions against him if the web site continued to violate Video Professor's rights and Video Professor later obtained evidence of Leonard's involvement; but leaving Leonard's name off

the injunction motion would have made it unnecessary for Leonard to litigate the case. But Video Professor went forward, ignoring a genuine effort to meet and confer, and filed a motion for a preliminary injunction directed explicitly at Leonard. By multiplying litigation in this vexatious manner, Video Professor's counsel made an award of fees appropriate under 28 U.S.C. § 1927, as well as under Rule 11.

The financial disparity between the parties provides an additional reason to award fees in this case. Video Professor is a highly successful company — according to the complaint, the "worldwide leader in the computer learning products industry," ¶ 17, with millions of copies of its products sold, and a multi-million-dollar advertising budget. ¶ 16. John W. Scherer's personal web site asserts that his company "ships more than 310,000 computer lessons per month," "has more than 10,000 independent sales affiliates across the United States and Canada," and runs television advertising "between 300-350 times per month in more than 65 million households across the United States and Canada." http://www.johnwscherer.com/. While defendant Leonard, by contrast, is a fitness instructor lacking the financial resources to defend against the suit. Leonard Affidavit ¶ 3. During the litigation, Video Professor tried to bully Leonard into settling regardless of the lack of merit of its suit against him, Levy Affidavit, ¶ 15 and Exhibit S. Only because Leonard had public interest counsel was he able to withstand Video Professor's bullying and resist a propopsed settlement that would have allowed Video Professor to suppress criticism regardless of the merits of that criticism. The litigation qualifies the suit against Leonard as oppressive as well as groundless and merits imposition of sanctions under Rule 11.

II. The Court Should Award $30,308.50 in Attorney Fees and Costs.

The basic standard for determining the amount of attorney fees to be awarded requires the Court to determine the lodestar amount – the number of hours reasonably spent defending the case, multiplied by the reasonable hourly rate to be awarded for that time. *Anderson v. Secretary of Health and Human Services*, 80 F.3d 1500, 1504 (10th Cir. 1996); *Mares v. Credit Bureau of Raton,* 801 F.2d 1197, 1201 (10th Cir. 1986).

In this case, the attached affidavits of Paul Alan Levy, Leonard's lead counsel in this case, and Barry Roseman, Leonard's local counsel, shows that their reasonable hourly rates are $465 and $375 respectively.[6] The affidavits show that counsel have reasonably spent 62.1 and 5.5 hours on the litigation, respectively, producing the following table showing the amount of attorney fees to be awarded:

Attorney	**Hourly Rate**	**Number of Hours**	**Total**
Paul Alan Levy	$465	60.4	$28,086.00
Barry Roseman	375	5.5	2,062.50
TOTAL		77.6	$30,148.50

In addition, Leonard incurred $160 in expenses, shown in the Second Levy Affidavit

CONCLUSION

The motion for an award of $30,308.50 in attorney fees and costs should be granted.

---

[6]Although Mr. Levy works for Public Citizen Litigation Group, a public interest law firm, attorney fees should be awarded based on an hourly rate that reflects the market for legal services. *Blum v. Stenson*, 465 U.S. 886 (1984). The rate requested is the rate set forth in the United States Department of Justice's *Laffey* matrix, as explained in the Second Levy Affidavit, ¶ 9.

Respectfully submitted,

/s/ Paul Alan Levy
Paul Alan Levy (DC Bar 946400)[7]

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

/s/ Barry D. Roseman
Barry D. Roseman

McNamara, Roseman, Martínez & Kazmierski, LLP
1640 East 18th Avenue
Denver, Colorado 80218
(303) 333-8700

Attorneys for Leonard

July 22, 2009

[7]Counsel is grateful to Jon Taylor, a second-year student at Harvard Law School, for his assistance in the preparation of this memorandum.